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November 21, 2008

BY E-MAIL

Fran Kammerer
Office of Environmental Health Hazard Assessment
P. O. Box 4010
Sacramento, California 95812-4010

Re: Proposed Amendment of 27 CCR 25204 - Safe Use Determinations

Dear Fran:


On behalf of the National Paint & Coatings Association, Inc., and California Paint Council, I want to express our appreciation for OEHHA's proposal to amend the SUD regulation to remove the "advisory" limitation in the current regulation, and replace it with a presumption of compliance with Proposition 65 for exposures covered by the a SUD.

We note a potential ambiguity in the proposed language of Section 25204, which states that a SUD "creates a rebuttable presumption" of "compliance with the Act and all related regulations." Under Health and Safety Code Section 25249.10(c), a business can establish that any exposure to a listed chemical is exempt from the warning requirement, and it bears the burden to establish this exemption in an enforcement action. See *DiPirro v. Bondo Corp.*, 153 Cal. App. 4th 150 (2007); *Consumer Defense Group v. Rental Housing Industry Members*, 137 Cal.App.4th 1185, 1214 (2006). The language of proposed Section 25204 is potentially susceptible to an argument that the "presumption" intended to be afforded is a presumption affecting the burden of production (i.e., shifting the burden back to a plaintiff in an enforcement action, but otherwise not affecting the burden of proof), rather than a presumption affecting the burden of proof (i.e., establishing the exemption defense, but allowing for the presumption to be rebutted upon a showing by plaintiff that outweighs the SUD). Based on the language in the Initial Statement of Reasons, indicating that OEHHA believes that SUDs should be used "to solve problems that normally would have to be resolved in private litigation, through often lengthy procedures," we understand that OEHHA intends that a SUD would in fact be sufficient to *establish* the exemption defense, and not simply shift the burden of proof back to the enforcer, and thus the presumption is intended to affect the burden of proof. While the agency could explain this rationale in the Final Statement of Reasons, we believe the better approach would be to clarify the regulatory language, by inserting the phrase "affecting the burden of proof" after the word "presumption."

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NPCA and CPC hope that their positive experience in the process that led to the SUD that was issued for crystalline silica in latex paint, and this proposed revision to the SUD regulation, will encourage more businesses to seek SUDs. We agree with OEHHA's goal, as expressed in the ISOR, to promote the consideration "of very technical scientific and legal issues that are best resolved in the open and public process afforded by OEHHA, rather than on a case-by-case basis through private litigation," and again thank you for hearing our request that SUDs be given appropriate weight by the courts.

Very truly yours,



Jeffrey B. Margulies

cc: D. Lloyd
T. Graves
S. George